U.S. Department of Homeland Security
U.S. Citizenship and Immigration Service
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 13 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a construction company. It seeks to employ the beneficiary permanently in the United States as an operations manager, level II, pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification, approved by the United States Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification; and the petitioner failed to demonstrate its continuing ability to pay the proffered wage as of the priority date onward and denied the petition accordingly.

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[1]

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

On Form I-290B, Notice of Appeal or Motion, counsel stated that the director's request for official transcripts directly from the university was not required by the statute and therefore his request was overreaching. Counsel also asserted that the director's evaluation of the financial evidence lacked understanding of real world of business. On appeal, the petitioner submits additional evidence, including credentials evaluations and financial documents.

The petitioner must demonstrate that, on the priority date, the beneficiary had the qualifications stated on the labor certification. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977). The petitioner must also demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the labor certification, was accepted for processing by the DOL. *See* 8 C.F.R. § 204.5(d). Here, the ETA Form 9089 was accepted for

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[1] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

processing on September 22, 2008.[2] The Immigrant Petition for Alien Worker (Form I-140) was filed on November 22, 2010.

The AAO will first discuss whether the beneficiary had the qualification stated on the labor certification on the priority date. At the outset, however, it is important to discuss the respective roles of the DOL and U.S. Citizenship and Immigration Services (USCIS) in the employment-based immigrant visa process. As noted above, the labor certification in this matter is certified by the DOL. The DOL's role in this process is set forth at section 212(a)(5)(A)(i) of the Act, which provides:

> Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

It is significant that none of the above inquiries assigned to the DOL, or the regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether the position and the alien are qualified for a specific immigrant classification. This fact has not gone unnoticed by federal circuit courts:

> There is no doubt that the authority to make preference classification decisions rests with INS. The language of section 204 cannot be read otherwise. *See Castaneda-Gonzalez v. INS*, 564 F.2d 417, 429 (D.C. Cir. 1977). In turn, DOL has the authority to make the two determinations listed in section 212(a)(14).[3] *Id.* at 423. The necessary result of these two grants of authority is that section 212(a)(14) determinations are not subject to review by INS absent fraud or willful misrepresentation, but all matters relating to preference classification eligibility not expressly delegated to DOL remain within INS' authority.
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[2] If the petition is approved, the priority date is also used in conjunction with the Visa Bulletin issued by the Department of State to determine when a beneficiary can apply for adjustment of status or for an immigrant visa abroad. Thus, the importance of reviewing the *bona fides* of a job opportunity as of the priority date is clear.

[3] Based on revisions to the Act, the current citation is section 212(a)(5)(A).

> Given the language of the Act, the totality of the legislative history, and the agencies' own interpretations of their duties under the Act, we must conclude that Congress did not intend DOL to have primary authority to make any determinations other than the two stated in section 212(a)(14). If DOL is to analyze alien qualifications, it is for the purpose of "matching" them with those of corresponding United States workers so that it will then be "in a position to meet the requirement of the law," namely the section 212(a)(14) determinations.

Madany v. Smith, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983). Relying in part on *Madany*, the Ninth Circuit stated:

> [I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL's role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS's decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from the DOL that stated the following:

> The labor certification made by the Secretary of Labor . . . pursuant to section 212(a)(14) of the [Act] is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.,* revisited this issue in *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984), stating:

> The Department of Labor (DOL) must certify that insufficient domestic workers are available to perform the job and that the alien's performance of the job will not adversely affect the wages and working conditions of similarly employed domestic workers. *Id.* § 212(a)(14), 8 U.S.C. § 1182(a)(14). The INS then makes its own determination of the alien's entitlement to sixth preference status. *Id.* § 204(b), 8 U.S.C. § 1154(b). (*See generally K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006, 1008 9th Cir.1983).
>
> The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.

Therefore, it is the DOL's responsibility to determine whether there are qualified U.S. workers available to perform the offered position, and whether the employment of the beneficiary will adversely affect similarly employed U.S. workers. It is the responsibility of USCIS to determine if the beneficiary qualifies for the offered position, and whether the offered position and beneficiary are eligible for the requested employment-based immigrant visa classification.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany* at 1015. USCIS must examine "the language of the labor certification job requirements" in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

On the ETA Form 9089, the "job offer" position description for an operations manager provides, "Plan, direct or coordinate operations of company." Regarding the minimum level of education and experience required for the proffered position in this matter, Part H of the labor certification reflects the following requirements:

H.4. Education: Minimum level required: "Master's"

H.4-B. Major Field Study: "Economics"

H.6. Is experience in the job offered required for the job?

The petitioner checked "no" to this question.

H.7. Is there an alternate field of study that is acceptable?

The petitioner checked "no" to this question.

H.8. Is there an alternate combination of education and experience that is acceptable?

The petitioner checked "no" to this question.

H.9. Is a foreign educational equivalent acceptable?

The petitioner checked "yes" that a foreign educational equivalent would be accepted.

H.10. Is experience in an alternative occupation acceptable?

The petitioner checked "no" to this question.

H.14. Specify skills or other requirement.

The petitioner left this section blank.

On the ETA Form 9089, signed by the beneficiary, undated, he indicated that the highest level of achieved education related to the requested occupation was a master's degree in economics. He listed the institution of study where that education was obtained as " " in Warsaw, Poland, and the year completed as 2001. In support of the beneficiary's educational qualifications, the petitioner submitted a copy of the beneficiary's diploma with a translation, from " in Warsaw." This document indicates that the beneficiary completed graduate studies in a "Master's Degree Program" on June 12, 2001, majoring in economics.

The record also contains copies of Indeks.[4] According to abridged translations of these documents, handwritten transcripts reflect the courses the beneficiary completed and the grades he received. The translation of the first Indeks indicates that the beneficiary "passed his master's diploma examination and received a good grade" on June 12, 2001, containing a round seal of " in Warsaw." The translation of the second Indeks states that the beneficiary "passed his bachelor's diploma examination and received a good grade" on April 19, 1999, containing a seal of " in Nisko."

The petitioner submits an evaluation, dated November 8, 2010, from an evaluator of the concludes that based on the nature of the courses, the credit hours involved, the grades attained, and the number of years of coursework, the beneficiary's degrees are equivalent to a Bachelor of Arts Degree in Economics and a Master of Arts Degree in Economics from an accredited college or university in the United States.

The AAO first notes that the record does not contain a copy of the beneficiary's bachelor's diploma from the in Nisko or official transcripts for his degrees. Second, the abridged translation suggests that the beneficiary completed the fourth semester of his master's degree in Nisko; however, the document in Polish does not contain the word "Nisko" on pages 20 and 21, where the fourth semester information is found. Such inconsistency in translation raises doubts about the accuracy of the translations provided in support of the petition. Doubt cast on any aspect of the petitioner's evidence may lead to a

[4] Indeks, study book used to record attendance, courses taken, and credits and grades received. (http://edge.aacrao.org/country/glossary/poland-glossary).

reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. USCIS may reject a fact stated in the petition if it does not believe that fact to be true. Section 204(b) of the Act, 8 U.S.C. § 1154(b); *see also Anetekhai v. I.N.S.*, 876 F.2d 1218, 1220 (5th Cir. 1989); *Lu-Ann Bakery Shop, Inc. v. Nelson*, 705 F. Supp. 7, 10 (D.D.C. 1988); *Systronics Corp. v. INS*, 153 F. Supp. 2d 7, 15 (D.D.C. 2001). It is incumbent upon the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho* at 591-592.

The director denied the petition on December 30, 2011, concluding that the petitioner failed to provide the beneficiary's official transcripts. On appeal, counsel asserts that the director's request of official transcripts was overreaching and such evidence was not required by the relevant statutes. Counsel further states that transcripts cannot be obtained directly from the school because such procedures do not exist in Poland; the students, not the university, are in possession of the handwritten transcript booklet.

The AAO notes that for this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree" (plus evidence of five years of progressive experience in the specialty). For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of "an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study." We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Counsel's assertion that Poland does not have a system of providing official transcripts directly from the university does not satisfy the petitioner's burden of proof. Without documentary evidence, the assertions of counsel will not satisfy the petitioner's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena*, 19 I&N Dec. 533, 534 (BIA 1988); *Matter of Laureano*, 19 I&N Dec. 1 (BIA 1983); *Matter of Ramirez-Sanchez*, 17 I&N Dec. 503, 506 (BIA 1980). The petitioner submitted no independent evidence indicating that the institutions where the beneficiary obtained his degrees are unable to provide official transcripts.

In determining whether the beneficiary's master's diploma from the in Warsaw is a foreign equivalent degree, we have reviewed the Electronic Database for Global Education (EDGE) created by the American Association of Collegiate Registrars and Admissions Officers (AACRAO). According to its website, www.aacrao.org, AACRAO is "a nonprofit, voluntary, professional association of more than 11,000 higher education admissions and registration professionals who represent more than 2,600 institutions and agencies in the United States and in over 40 countries around the world." http://www.aacrao.org/About-AACRAO.aspx (accessed on May 23, 2013). Its mission "is to serve and advance higher education by providing leadership in academic and enrollment services." *Id.* According to the registration page for

EDGE, EDGE is "a web-based resource for the evaluation of foreign educational credentials.' http://edge.aacrao.org/info.php (accessed on May 23, 2013).

Authors for EDGE are not merely expressing their personal opinions. Rather, authors for EDGE must work with a publication consultant and a Council Liaison with AACRAO's National Council on the Evaluation of Foreign Educational Credentials. "An Author's Guide to Creating AACRAO International Publications" 5-6 (First ed. 2005), available for download at http://www.aacrao.org/Libraries/Publications_Documents/GUIDE_TO_CREATING_INTERNATIONAL_PUBLICATIONS_1.sflb.ashx. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

EDGE provides a great deal of information about the educational system in Poland, and while it confirms that a "dyplom tytul magister" is awarded, it does not suggest that a "dyplom tytul magister" degree obtained in Poland may be deemed a foreign equivalent degree to a U.S. master's degree. Rather, EDGE states that "dyplom tytul magister" is an equivalent degree to a U.S. bachelor's degree. This information is inconsistent with the evaluation submitted. On March 5, 2013, the AAO issued a notice of intent to dismiss (NOID), attaching a copy of the EDGE report reflecting that the dyplom tytul magister is an equivalent degree to a U.S. bachelor's degree and specifically asked the petitioner to address the conclusions of EDGE.

In response, the petitioner submits a credentials evaluation, dated April 2, 2013, from from , comparing the beneficiary's courses to those required in a U.S. master's degree program in economics. states that the beneficiary's two-year master's program satisfies all of the academic requirements for a Master of Arts Degree in Economics from a regionally accredited U.S. college or university. also states that EDGE contains "blatant errors" and the international education community holds that EDGE's opinion toward minimum equivalencies is "skewed." In support of his assertion, submits a letter from , Assistant Dean at , stating that EDGE "takes a conservative view as to the *minimum* [emphasis in the original] acceptable requirement and we believe that it should be viewed with latitude of judgment by each institution."

USCIS may, in its discretion, use as advisory opinions statements submitted as expert testimony. However, where an opinion is not in accord with other information or is in any way questionable, the Service is not required to accept or may give less weight to that evidence. *Matter of Caron International*, 19 I&N Dec. 791 (Comm'r 1988); *Matter of Sea, Inc.*, 19 I&N Dec. 817 (Comm'r 1988). *See also Matter of D-R-*, 25 I&N Dec. 445 (BIA 2011)(expert witness testimony may be given different weight depending on the extent of the expert's qualifications or the relevance, reliability, and probative value of the testimony). Here, does not indicate which degree and transcripts he reviewed to reach his conclusion about the beneficiary's master's degree. However, if he reviewed the abridged translations of the handwritten booklets, his evaluations cannot be given much weight. As indicated above, we question the accuracy of the translations accompanying the Polish documents submitted.

Regarding the AAO's reliance on reports provided by EDGE, a federal district court in *Tisco Group, Inc. v. Napolitano*, 2010 WL 3464314 (E.D.Mich. August 30, 2010), found that USCIS had properly weighed the evaluations submitted and the information obtained from EDGE to conclude that the alien's three-year foreign "baccalaureate" and foreign "Master's" degree were comparable to a U.S. bachelor's degree. Another federal court in *Sunshine Rehab Services, Inc.*, 2010 WL 3325442 (E.D.Mich. August 20, 2010), concluded that USCIS was entitled to prefer the information in EDGE and did not abuse its discretion in reaching its conclusion. In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D. Minn. March 27, 2009), a federal district court determined that the AAO provided a rational explanation for its reliance on information provided by the AACRAO to support its decision.

The petitioner has not overcome the conclusion reached based on the report provided on EDGE that the beneficiary's "dyplom tytul magister" degree is an equivalent to a U.S. bachelor's degree. The AAO concludes that the petitioner has not established that the beneficiary possesses a U.S. master's degree or an equivalent foreign degree in economics. The Form ETA 9089 does not require any experience in the job offered or in a related field and the beneficiary does not indicate any employment history. Because the beneficiary has neither a U.S. master's degree or foreign equivalent degree in economics, nor a U.S. baccalaureate degree or foreign equivalent degree in economics *and* five years of progressive experience in the specialty, he does not qualify for preference visa classification as an advanced degree professional under section 203(b)(2) of the Act.

The AAO will next address the petitioner's continuing ability to pay the proffered wage as of the priority date onwards. The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 9089, Application for Permanent Employment Certification, was accepted for processing by any office within the employment system of the DOL. *See* 8 C.F.R. § 204.5(d). Here, the Form ETA 9089 was accepted on September 22, 2008. The proffered wage as stated on the Form ETA 9089 is $51.98 per hour or $108,118.40 per year.

The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA 9089 labor certification application establishes a priority date for any immigrant petition

later based on the ETA 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each year thereafter, until the beneficiary obtains lawful permanent residence. The petitioner's ability to pay the proffered wage is an essential element in evaluating whether a job offer is realistic.

In evaluating whether a job offer is realistic, USCIS requires the petitioner to demonstrate financial resources sufficient to pay the beneficiary's proffered wages, although the totality of the circumstances affecting the petitioning business will be considered if the evidence warrants such consideration. *See Matter of Sonegawa*, 12 I&N Dec. 612 (Reg'l Comm'r 1967). However, where a petitioner has filed multiple petitions for multiple beneficiaries which have been pending simultaneously, the petitioner must produce evidence that its job offers to each beneficiary are realistic, and therefore that it has the ability to pay the proffered wages to each of the beneficiaries of its pending petitions, as of the priority date of each petition and continuing until the beneficiary of each petition obtains lawful permanent residence. *See Matter of Great Wall*, 16 I&N Dec. 142, 144-145 (Acting Reg. Comm. 1977) (petitioner must establish ability to pay as of the date of the Form MA 7-50B job offer, the predecessor to the Form ETA 750 and Form ETA 9089). *See also* 8 C.F.R. § 204.5(g)(2).

In determining the petitioner's ability to pay the proffered wage during a given period, USCIS will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage.

The evidence in the record shows that the petitioner is structured as a C corporation. On the petition, the petitioner claimed to have been established in 1995 and to employ 15 workers. The record indicates that the beneficiary has been working for the petitioner since 2011. The record contains the petitioner's federal corporate tax returns from 2008 through 2011; and the beneficiary's Internal Revenue Service (IRS) Forms W-2 for 2011 and 2012, which reflect that the petitioner paid the beneficiary the following wages:

Year	Wages Paid[5]	Amount Less than the Proffered Wage
2011	$69,422.41	$38,695.99
2012	$82,930.50	$25,187.90

The record demonstrates that the petitioner did not employ the beneficiary prior to 2011 and did not pay the beneficiary an amount at least equal to the proffered wage in 2011 and 2012. Therefore, the petitioner must establish the ability to pay proffered wage from 2008 to 2010 and the difference between the proffered wage and actual wages paid in 2011 and 2012 as shown in the table above.

[5] It is the amount reflected in box 1 of IRS Form W-2.

If the petitioner does not establish that it employed and paid the beneficiary an amount at least equal to the proffered wage during that period, USCIS will next examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. *River Street Donuts, LLC v. Napolitano*, 558 F.3d 111 (1st Cir. 2009); *Taco Especial v. Napolitano*, 696 F. Supp. 2d 873 (E.D. Mich. 2010), *aff'd*, No. 10-1517 (6th Cir. filed Nov. 10, 2011). Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F. Supp. 1049, 1054 (S.D.N.Y. 1986) (*citing Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305 (9th Cir. 1984)); *see also Chi-Feng Chang v. Thornburgh*, 719 F. Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F. Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F. Supp. 647 (N.D. Ill. 1982), *aff'd*, 703 F.2d 571 (7th Cir. 1983).

For a C corporation, USCIS considers net income to be the figure shown on Line 28 of the Form 1120, U.S. Corporation Income Tax Return. At the time the AAO received the petitioner's response, the 2012 federal income tax return was not yet due. Therefore, the petitioner's income tax return for 2011 is the most recent return available.[6] The petitioner's tax returns indicate the following information:

Year	Net Income
2008	$15,930
2009	$-37,022
2010	$158,996
2011	$97,969

Thus, for the years 2008 and 2009, the petitioner did not have sufficient net income to pay the proffered wage.

As an alternate means of determining the petitioner's ability to pay the proffered wage, USCIS may review the petitioner's net current assets. Net current assets are the difference between the petitioner's current assets and current liabilities.[7] A corporation's year-end current assets are shown on Schedule L, lines 1 through 6 and include cash-on-hand. Its year-end current liabilities

[6] The AAO notes that in his April 9, 2013 letter, counsel states the petitioner has applied for an extension for its 2012 return and submits a copy of an income tax extension request for the calendar year 2011 filed with the North Carolina Department of Revenue. Counsel provides no explanation for the relevancy of this evidence, nor does he explain why the petitioner requested a tax extension from North Carolina while it is located in New Jersey.

[7] According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

are shown on lines 16 through 18. If the total of a corporation's end-of-year net current assets and the wages paid to the beneficiary (if any) are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage using those net current assets.

Year	Year-end Current Assets	Year-end Current Liabilities	Net Current Assets
2008	$998,070	$808,477	$189,593
2009	$683,284	$648,315	$34,969

The petitioner's tax return demonstrates that in 2009, the petitioner did not have sufficient net current assets to pay the proffered wage.

However, USCIS may also consider the overall magnitude of the petitioner's business activities in its determination of the petitioner's ability to pay the proffered wage. *See Matter of Sonegawa,* 12 I&N Dec. at 612. The petitioning entity in *Sonegawa* had been in business for over 11 years and routinely earned a gross annual income of about $100,000. During the year in which the petition was filed in that case, the petitioner changed business locations and paid rent on both the old and new locations for five months. There were large moving costs and also a period of time when the petitioner was unable to do regular business. The Regional Commissioner determined that the petitioner's prospects for a resumption of successful business operations were well established. The petitioner was a fashion designer whose work had been featured in *Time* and *Look* magazines. Her clients included Miss Universe, movie actresses, and society matrons. The petitioner's clients had been included in the lists of the best-dressed California women. The petitioner lectured on fashion design at design and fashion shows throughout the United States and at colleges and universities in California. The Regional Commissioner's determination in *Sonegawa* was based in part on the petitioner's sound business reputation and outstanding reputation as a couturiere. As in *Sonegawa*, USCIS may, at its discretion, consider evidence relevant to the petitioner's financial ability that falls outside of a petitioner's net income and net current assets. USCIS may consider such factors as the number of years the petitioner has been doing business, the established historical growth of the petitioner's business, the overall number of employees, the occurrence of any uncharacteristic business expenditures or losses, the petitioner's reputation within its industry, whether the beneficiary is replacing a former employee or an outsourced service, or any other evidence that USCIS deems relevant to the petitioner's ability to pay the proffered wage.

Furthermore, the sole shareholder of a corporation has the authority to allocate expenses of the corporation for various legitimate business purposes, including for the purpose of reducing the corporation's taxable income. Compensation of officers is an expense category explicitly stated on tax returns. For this reason, the petitioner's figures for compensation of officers may be considered as additional financial resources of the petitioner, in addition to its figures for ordinary income.

In response to the AAO's NOID, the petitioner states that its "tax returns reflect a significant cash flow, and an increase I [*sic*] gross revenues of thirty percent from 2008 to 2011." The

petitioner also states that its payroll from 2008 to 2012 was substantial and it is "clear" that it has the continuing ability to pay the proffered wage. The AAO also notes that on Form I-290B, counsel asserts that the petitioner has spent over one million dollars on subcontractors and the beneficiary's salary could be offset by replacing one of these subcontractors. Counsel further asserts that employer's bank statements show a positive monthly balance and submits the petitioner's bank statements from 2009 to 2011.

We first note that the regulation at 8 C.F.R. § 204.5(g)(2) states that evidence of the petitioner's ability to pay shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements; therefore, bank statements are not sufficient to prove the petitioner's ability to pay. The AAO also finds counsel's assertion that the petitioner could pay the proffered wage by replacing one of the subcontractors unsupported. Absent supporting documentation, these assertions are insufficient proof of the petitioner's ability to pay. *See Matter of Kwan,* 14 I&N Dec. 175 (BIA 1972) ("Information in an affidavit should not be disregarded simply because it appears to be hearsay; in administrative proceedings, that fact merely affects the weight to be afforded it."). Going on record without supporting documentary evidence generally is not sufficient for purposes of meeting the burden of proof in these proceedings. *See Matter of Soffici,* 22 I&N Dec. 158, 165 (Comm. 1998) (citing *Matter of Treasure Craft of California,* 14 I&N Dec. 190 (Reg. Comm. 1972)).

Furthermore, nothing in the record demonstrates that any of the contractors in fact performed the duties the beneficiary otherwise would have provided. If a contractor performed other kinds of work, then the beneficiary could not have replaced him or her.[8] In addition, the evidence in the record does not demonstrate the petitioner's historical growth since its inception, nor does it demonstrate its reputation in the industry. Furthermore, the sole share owner of the petitioner makes no explicit statements indicating that he would forego his officer compensation in order to pay the proffered wage. Considering the totality of the circumstances, the petitioner fails to demonstrate that it had the continuing ability to pay the beneficiary from the priority date onward.

Beyond the director's decision, the record reflects that the petitioner filed Form I-140 immigrant petitions for multiple beneficiaries. In the NOID, the AAO informed the petitioner that it must establish its ability to pay each beneficiary. In response, counsel states that the petitioner "is not aware of any other employment sponsorships, at least not since September of 2008," when the petitioner filed the instant labor certification. The petitioner's purported lack of knowledge, as asserted by its counsel, of other beneficiaries for whom it petitioned is not sufficient to establish its ability to pay each beneficiary. Moreover, counsel's assertion without documentary evidence is not sufficient to establish that the petitioner is unaware of its other beneficiaries. As indicated

[8] The purpose of the instant visa category is to provide employers with foreign workers to fill positions for which U.S. workers are unavailable. If the petitioner is, as a matter of choice, replacing U.S workers with foreign workers, such an action would be contrary to the purpose of the visa category and could invalidate the labor certification. However, this consideration does not form the basis of the decision on the instant appeal.

above, without documentary evidence, the assertions of counsel will not satisfy the applicant's burden of proof. The unsupported assertions of counsel do not constitute evidence. *See Matter of Obaigbena* at 534; *Matter of Laureano* at 1; *Matter of Ramirez-Sanchez* at 506.

The AAO clearly stated that USCIS records show multiple beneficiaries for the petitioner without referring to a specific timeframe and requested information regarding the status of each petition and the petitioner's ability to pay each beneficiary. The petitioner makes no attempt to submit any of the requested information regarding its other beneficiaries. It's incumbent on the petitioner to provide the requested information. Furthermore, USCIS records do not reflect that any of these petitions were withdrawn. Considering that, for 2009, the petitioner did not have the net income or the net current assets to pay the proffered wage to the instant beneficiary alone, the AAO finds that the petitioner did not have the ability to pay the proffered wages for all of its beneficiaries. Therefore, the petitioner has failed to demonstrate that it has the continuing ability to pay the proffered wage from the priority date onward.

In summary, the AAO concludes that the petitioner has failed to demonstrate that the beneficiary qualifies for classification pursuant to section 203(b)(2) of the Act. The petitioner also has failed to demonstrate that it has the continuing ability to pay the beneficiary the proffered wage from the priority date onward.

The petition will be denied for the above stated reasons, with each considered as an independent and alternative basis for denial. In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.